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Opal Pyramid Sdn Bhd v Wan Muhammad Ibrisam bin Wan Ibrahim & Ors

B HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–981 OF 2005
KANG HWEE GEE J
6 JUNE 2007

C *Civil Procedure — Costs — Security for costs — Discretion of court — Plaintiff a dormant company with RM2 paid up capital — Whether claim bone fide and bound to fail*

D *Companies and Corporations — Arrangement, scheme of — Security for defendant's costs — Discretion of court to order security to be provided — Whether exists credible testimony to believe plaintiff unable to pay costs of the defendant if successful in defence — s 351 Companies Act 1965*

E The plaintiff's suit arose from the breach of a contract between the plaintiff and the fourth and fifth defendants wherein the plaintiff was to take over the fifth defendant company's business upon successful implementation of a restructuring exercise under s 176 of the Companies Act 1965. The plaintiff was a dormant company with a RM2 paid up capital and would have only become functional vis a vis a scheme which had
F failed in its entirety. The defendant applied for security for costs which were granted by the senior assistant registrar who ordered the plaintiff to pay RM75,000 as security for costs of the first to fourth defendants into court one month prior to the fixing of the date of the full trial. The plaintiff appealed.

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Held, allowing the appeal with costs:

(1) A person's inability to pay costs should not be compromised with his right to justice; to order him to pay security for costs which he could ill afford will in one swoop demolish his claim and deny him of his day in court. The same
H principle should apply to a company (see para 5).

(2) A party applying for security should be allowed to succeed only if on a scrutiny of his opponent's case as a whole it can reasonably be concluded the claim was so weak that the likelihood of failure was predictable and if allowed to proceed for trial would cause the applicant to lose on costs which he may not be able
I to recover (see para 6).

(3) It was clear that all the defendants knew right from the start that the plaintiff was a company which was set up for a purpose of taking over the business of the fifth defendant in the event that the s 176 scheme of arrangement was successful. A company of this nature is not expected to carry a large asset; its

principal objective being merely to take over the fifth defendant's business. The court accepted the submission of counsel for the plaintiff that the plaintiff's claim was made bona fide (see paras 7–8).

(4) The plaintiff's claim was based on the alleged unlawful termination of the Definitive Agreement which it had secured with the fourth defendant. The success or failure of its claim would have to be determined within the four corners of that agreement where the relevant clauses would have to be examined to decide whether the termination was lawful (see para 9).

[Bahasa Malaysia summary

Tindakan plaintif berbangkit daripada satu perlanggaran kontrak di antara plaintif dan defendan keempat dan kelima di mana plaintif sepatutnya mengambilalih perniagaan defendan kelima selepas satu penstrukturan semula berjaya dilaksanakan di bawah s 176 Akta Syarikat 1965. Plaintif merupakan syarikat dorman dengan modal terbayar sebanyak RM2 dan hanya akan beroperasi melalui satu skim yang telah gagal keseluruhannya. Defendan telah memohon untuk jaminan kos di mana telah diberikan oleh penolong kanan pendaftar dan plaintif telah diperintahkan membayar RM75,000 sebagai jaminan kos defendan pertama hingga defendan keempat ke dalam mahkamah satu bulan sebelum penetapan tarikh untuk perbicaraan penuh. Plaintif merayu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Ketidakmampuan seseorang untuk membayar kos tidak harus dikompromikan dengan haknya mendapat keadilan; memerintahkannya untuk membayar jaminan untuk kos yang tidak mampu dibayarnya akan sekali gus menghapuskan tuntutannya dan menafikan kehadirannya di mahkamah. Prinsip yang sama juga patut terpakai untuk suatu syarikat (lihat perenggan 5).

(2) Jaminan patut diberikan kepada pihak yang memohon hanya sekiranya secara keseluruhan kes lawannya secara munasabah dapat diputuskan bahawa tuntutan tersebut adalah begitu lemah sehingga kebarangkalian untuk kegagalannya dapat diramal; dan sekiranya dibenarkan untuk perbicaraan ia akan menyebabkan pemohon menanggung kos yang tidak mungkin mampu diperoleh (lihat perenggan 6).

(3) Ia adalah jelas bahawa kesemua defendan-defendan mengetahui sejak dari mula bahawa plaintif adalah sebuah syarikat yang ditubuhkan untuk tujuan mengambilalih perniagaan defendan kelima sekiranya s 176 skima pengurusan berjaya. Sebuah syarikat seperti ini tidak boleh diharapkan mempunyai aset yang banyak; tujuan utamanya hanya untuk mengambilalih perniagaan defendan kelima. Mahkamah bersetuju dengan hujah peguamcara plaintif bahawa tuntutan plaintif adalah bona fide (lihat perenggan 7–8).

(4) Tuntutan plaintif adalah berdasarkan pengataan penamatan secara tidak sah perjanjian muktamad bersama dengan defendan keempat. Kejayaan atau kegagalan tuntutan itu akan dapat diputuskan semata-mata di dalam

A lingkungan perjanjian tersebut di mana klausa-klausa yang relevan patut diteliti untuk memastikan sama ada penamatan tersebut adalah mengikut undang-undang (lihat perenggan 9).]

Notes

B For cases on security for costs, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 1853–1890.

Cases referred to

Ashin Sdn Bhd v Datuk Bandar Kuala Lumpur & Ors [1999] 5 ML J 663 (refd)
Ballast Nedam Groep NV (M) Sdn Bhd v Tradebond (M) Sdn Bhd [2000] 6 MLJ 416 (refd)
C
Fong Phin Yow v Syarikat Bimacomi Sdn Bhd [1997] 1 LNS 141 (refd)
Gateway Land Pte Ltd v Turner (East Asia) Pte Ltd [1998] 1 MLJ 416 (refd)
Government of Sarawak v Sami Mousawi-Utama Sdn Bhd (in liquidation) [1998] 3 MLJ 820 (refd)
D *Government of Sarawak, The v Sami Mousawi-Utama Sdn Bhd* [1998] 3 MLJ 820 (refd)
Interfood Sdn Bhd v Arthur Anderson & Co & Anor [2005] 5 AMR 591 (refd)
Quality Tractors (M) Sdn Bhd v United Asian Bank Bhd [1980] 1 MLJ 95 (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)
Syarikat Kesemua Sdn Bhd v Barawan Razak & Ors [2004] 7 CLJ 563 (refd)
E

Legislation referred to

Companies Act 1965 ss 176, 351

JT Sambanthan (Joshua Sambanthan) for the plaintiff.
F *Adam Abdullah (S Maniarasan with him) (Adam Abdullah & Mani) for the first to fourth defendants.*

Kang Hwee Gee J (delivering oral judgment ex tempore):

G **[1]** This is an appeal by the plaintiff against the decision of the senior assistant registrar in allowing the first to fourth defendants' application for security for costs.

[2] The plaintiff's suit arose from the breach of a contract between the plaintiff and the fourth and fifth defendants wherein the plaintiff was to take over the fifth
H defendant company business upon the successful implementation of restructuring under s 176 of the Companies Act 1965.

[3] The grounds are as stated in the written submission as follows:

I 1 The learned assistant registrar has misconceived and perversed both on facts and law in deriving into the said decision without considering the following vital facts:

(a) Plaintiff was created only as a Special Purpose Vehicle ('SPV')'s company for the purposes of the rightful takeover exercise which is to be carried out by the fourth defendant or fifth defendant upon complying with the restructuring scheme created under s 176(3) and (4) of the Companies Act 1965. plaintiff was established on

15 April 2003 for the purposes of taking over exercise to be carried out between fourth defendant or fifth defendant company as per the definitive agreement.

(b) Plaintiff contends that fourth defendant is fully aware that plaintiff does not have any assets and properties when the fourth defendant signed the definitive agreement. The plaintiff was merely created as a special purpose vehicle to facilitate the takeover exercise as per the definitive agreement. This fact is fully within their knowledge. Nevertheless, when the plaintiff now commences legal action against the fourth defendant for the wrongful termination of the said definitive agreement and in order to stifle the plaintiff from further proceeding with the above suit, fourth defendant has now filed an application for security for cost against the plaintiff.

(c) Plaintiff contends that the fourth defendant's conduct are not bona fide wherein knowing the fact that the plaintiff has no assets or properties from the very first beginning, ie prior to the said agreement and now seeking to enforce security for cost against the plaintiff merely to prevent the plaintiff from proceeding with a bona fide claim is certainly an oppressive act on the fourth defendant.

(d) If the security for cost is forced upon the plaintiff, it will only result on the plaintiff's inability to continue with their bona fide and meritous claim against the fourth defendant. This will definitely defeat the plaintiff's genuine claim against the fourth defendant for wrongful termination and damage.

(e) Plaintiff's case rest solely on the fact that the notice of termination issued by the fourth defendant's solicitor are unlawful, void and premature as per the clause 13.17 of the definitive agreement.

Secondly: The notice of termination should not have been issued by fourth defendant's solicitor, Messrs Adam Abdullah & Mani because of the fact that one of their partners, S Maniarasan at the material date of issuing the notice of termination [ie 1 April 2005] was a director in the fourth defendant's company and a major shareholder in the fifth defendant's company. Hence arise conflict of interest on the conduct of the said solicitor and as such the firm should have recused themselves from representing the first till fourth defendants.

(f) Our claim is for damages in respect to an unlawful and premature termination of the definitive agreement.

Therefore in the interest of justice this appeal should be allowed and security for cost be dismissed with cost.

Cases referred to

1 *Syarikat Kesemua Sdn Bhd v Barawan Razak & Ors* [2004] 7 CLJ 563;

2 *Gateway Land Pte Ltd v Turner (East Asia) Pte Ltd* [1998] 1 MLJ 416;

3 *Quality Tractors (M) Sdn Bhd v United Asian Bank Bhd* [1980] 1 MLJ 95;

4 *Ashin Sdn Bhd v Datuk Bandar Kuala Lumpur & Ors* [1999] 5 ML J 663;

5 *Fong Phin Yow v Syarikat Bimacomi Sdn Bhd* [1997] 1 LNS 141;

6 *Government of Sarawak v Sami Mousawi-Utama Sdn Bhd (in liquidation)* [1998] 3 MLJ 820.

[4] The appeal is opposed by the first to fourth defendants on the grounds as stated in the written submission of counsel for the first to fourth defendants as follows:

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1 Enclosure 52

1.1 Enclosure 52 is the plaintiff's appeal against the order of the senior assistant registrar dated 11 November 2005 in respect of encl 17 whereby the senior assistant registrar ordered that the plaintiff pays RM75,000 as security for costs of the first defendant, second defendant, third defendant and fourth defendant ('the four defendants') into court one (1) month prior to the fixing of date of the full trial.

B

2 Brief Facts

2.1 The four defendants entered into a definitive agreement dated 9 May 2003 ('the DA') with the fifth defendant in respect of the proposed restructuring scheme of the fifth defendant ('the scheme'). The fifth defendant is classified by the Bursa Malaysia as a PN4 company.

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2.2 The Scheme hit a snag when the fifth defendant's petition for sanction vide Petition No D5(D4)–26–79–2004 to approve the Scheme was dismissed by the High Court on 31 January 2005. The fifth defendant's appeal to the Court of Appeal vide Civil Appeal No. W-02-99-2005 against the decision of the High Court was struck out on 15 June 2005.

D

2.3 The fifth defendant's application for leave to appeal to the Federal Court against the decision of the Court of Appeal vide Notice of Motion No W–08–89–2005 was heard by the Federal Court on 26 September 2005. The Federal Court had, on 26 September 2005, unanimously dismissed the fifth defendant's application for leave to appeal to the Federal Court with costs.

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2.4 In the meantime, the four defendants terminated the DA on 1 April 2005 on account of the fifth defendant's failure to obtain the requisite sanction of the High Court for the Scheme on or before the stipulated period which is 31 March 2005 (exhibits MSZ-9 and MSZ-10, Enclosure 12 refers)

2.5 The fifth defendant filed Civil Suit No D6–22–465–2005 against the four defendants ('the D6 suit') and obtained ex-parte interlocutory injunctions against the four defendants on 5 April 2005 ('the D6 injunctions'). These injunctions were to restrain the termination of the DA by the four defendants and to gag the four defendants from disclosing any information pertaining to the termination.

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2.6 The four defendants applied to set aside the D6 injunctions. On 1 August 2005, the High Court dissolved the ad interim injunctions granted in favour of the fifth defendant. The High Court also dismissed the fifth defendant's application for inter partes interlocutory injunctions against the four defendants with costs and allowed the four defendants' applications to set aside the D6 injunctions with costs.

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2.7 The plaintiff filed this suit on 11 July 2005 and subsequently, an application vide enclosure 4 for an interlocutory injunction against the four defendants on terms similar to the fifth defendant's application for an interlocutory injunction in the D6 suit. Enclosure 4 was dismissed with costs by this honourable court on 21 September 2005.

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3 The plaintiff

3.1 The plaintiff is a Special Purpose Vehicle ('SPV') of the Scheme. The plaintiff was incorporated on 15 April 2003 ONLY FOR ONE PURPOSE. Upon the completion of the implementation of the Scheme, the fifth defendant will become the wholly owned company of the fourth defendant. Pursuant to an understanding as per the DA, the fourth defendant will dispose the fifth defendant in its entirety to the plaintiff for RM1.00. The plaintiff will then proceed to liquidate or dispose off the fifth defendant and its group of companies.

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3.2 The plaintiff is a dormant company with a paid-up capital of RM2.00. The plaintiff will only become functional, vis-a-vis the Scheme, if and only if the scheme is completed.

The Scheme was not completed. It has failed in its entirety and does not exist anymore. Therefore, the plaintiff has no function and will not have any function in respect of the Scheme.

APPLICATION PURSUANT TO SECTION 351 OF THE COMPANIES ACT 1965

4 The suit commenced by the plaintiff is not bona fide

4.1 In this suit, the plaintiff has prayed for injunctive and declaratory relief against the four defendants.

4.2 The plaintiff's claim herein is not bona fide and bound to fail because the issues raised by the plaintiff herein are identical with the issues raised in the D6 suit commenced by the fifth defendant against the four defendants.

4.3 The factual and legal issues raised by the plaintiff herein are related to the similar facts and documents that were relied upon by the fifth defendant in the D6 suit against the four defendants.

4.4 In the meantime, the plaintiff has also filed an application to intervene in the D6 suit. In the circumstances, the plaintiff's conduct in pursuing this suit is clearly not bona fide.

4.5 A material fact which is not disputed is that the Scheme has failed in its entirety and does not exist anymore. The plaintiff has no function vis-a-vis the Scheme as the said Scheme has failed in its entirety.

4.6 Therefore, the purpose for which the plaintiff was incorporated is no longer in existence. In the circumstances, the plaintiff is not entitled to commence this action and this reinforces the four defendants' contention that the suit commenced by the plaintiff is not bone fide.

4.7 Further, in the writ of summons and the statement of claim, the plaintiff stated that the plaintiff has a duty to protect the rights and interest of the fifth defendant's shareholders and on that basis, has commenced this action. It is evident that the plaintiff has commenced this action purportedly for the benefit of a third party, namely the shareholders and the creditors of the fifth defendant.

4.8 In any event, the plaintiff's contention that this suit was commenced solely to protect the interest of the shareholders and the creditors of the fifth defendant defies logic and is without any basis as the plaintiff does not have the required locus standi to initiate this action with a view of protecting the interest of the shareholders and the creditors of the fifth defendant.

4.9 Based on the aforesaid reasons, it is abundantly clear that the suit commenced by the plaintiff herein is not bone fide.

4.10 Based on the aforesaid reasons and the four defendants' defence filed herein, it is clear that the four defendants have a strong defence against the plaintiff's claim herein. Therefore, the four defendants require a security that the four defendants' costs will be paid by the plaintiff in the event the plaintiff's claim against the four defendants is dismissed by this Honourable Court.

5 The plaintiff is a dormant company with a paid up capital of RM2.00 only

5.1 The plaintiff was incorporated on 15.4.2003 for a sole purpose as stated above. The plaintiff is a dormant private limited company with a paid up capital of RM2.00 only.

5.2 It is abundantly clear that the plaintiff will not be able to pay the four defendants' costs in relation to this suit.

5.3 In addition, the four defendants will be severely prejudiced if the four defendants do not have a security that their costs will be borne and paid by the plaintiff.

5.4 The suit commenced by the plaintiff herein is not bone fide especially so in a situation where the scheme has failed in its entirety and does not exist anymore. In the circumstances, the plaintiff has no function vis-a-vis the scheme.

5.5 The application herein (enclosure 17) is only intended to protect the interest of the four defendants vis-a-vis the costs and is not, in anyway, designed to prevent the plaintiff from pursuing this action.

5.6 The amount sought by the four defendants each as security for costs is fair and reasonable in all the circumstances of the case. In any event, the amount sought as security for costs is subject to the discretion of the court. Further, to-date, costs has been awarded to the four defendants as follows:

(i) In respect of enclosure 4 (the plaintiff's application), the court had, on 21 September 2005, ordered that the costs of the said application be borne by the plaintiff;

(ii) In respect of enclosure 17 (the four defendants' application for security for costs), the court had, on 11 November 2005, ordered that the costs of the said application be borne by the plaintiff;

(iii) In respect of enclosure 25 (the plaintiff's application), the court had, on 28 July 2006, ordered that the costs of the said application to be paid by the directors of the plaintiff to the four defendants. The plaintiff has also lodged an appeal to the Court of Appeal vide Civil Appeal No W–02–860–06 against the decision of the High Court;

Other than the above, this honourable court ought to consider that enclosure 22 (the plaintiff's application) is pending adjudication while the full trial of this action has not commenced. We humbly submit that these factors ought to be considered by this honourable court in determining the amount to be paid by the plaintiff to each of the four defendants, as security for costs.

6 Legal requirements in respect of enclosure 17

6.1 Section 351 of the Companies Act 1965 provides as follows:

> Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

6.2 Based on the above mentioned provision, the court only has to be satisfied that, 'if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence'. If thecourt is so satisfied, then the four defendants' application for security for costs ought to be allowed as prayed in enclosure 17 herein.

6.3 Other than the fact that the scheme has failed, this honourable hourt ought to consider that the plaintiff is a dormant private limited company with a paid up capital of RM2.00 only. The last company search revealed that the plaintiff suffered a net loss of RM3,401.

6.4 In any event, this Honourable Court has discretion whether or not to grant an order for security for costs. The principle of law upon which the Court ought to exercise its discretion has been stated in the following authorities:

(i) Section 351 of the Companies Act 1965;

(ii) *Interfood Sdn Bhd v Arthur Anderson & Co & Anor* [2005] 5 AMR 591;

(iii) *Government of Sarawak v Sami Mousawi-Utama Sdn Bhd (in liquidation)* [1998] 3 MLJ 820;

(iv) *Ballast Nedam Groep NV (M) Sdn Bhd v Tradebond (M) Sdn Bhd* [2000] 6 MLJ 416.

6.5 In view of the above, the four defendants submit that there are no merits in the appeal lodged by the plaintiff vide enclosure 52. In the circumstances, the four defendants pray that the plaintiff's appeal in enclosure 52 be dismissed with costs.

6.6 The four defendants also pray that the order of the senior assistant registrar dated 11 November 2005 in respect of enclosure 17 whereby the senior assistant registrar made the following order:

> ... that the plaintiff pays RM75,000 as security for costs of the four defendants into court one (I) month prior to the fixing of date of the full trial...

be varied in the following manner:

(i) that the plaintiff pays RM75,0000 as security for costs of the four defendants into court one (1) month from the date of the order made herein

(ii) that all further proceedings in this action be stayed pending the payment of security for costs by the plaintiff as ordered by the court;

(iii) that if the plaintiff fails to comply with the order made herein within the time stipulated herein, the entire action shall stand struck out forthwith and all costs of this action shall be paid forthwith by the plaintiff to the first defendant, second defendant, third defendant and fourth defendant;

6.7 Thec will rely on the following authorities for the aforesaid submission:

(i) *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97;

(ii) *Halsbury's Laws of Malaysia.*

FINDINGS AND DECISION

[5] A person's inability to pay costs should not be compromised with his right to justice; to order him to pay security for costs which he could ill afford will in one fell swoop demolish his claim and deny him of his day in court. The same principle should apply to a company.

[6] A fine balance of justice is required. A party applying for security should be allowed to succeed only if on a scrutiny of his opponent's case as a whole it can reasonably be concluded the claim is so weak that the likelihood of failure is predictable; and if allowed to proceed for trial would cause the applicant to lose on costs which he may not be able to recover.

[7] I would accept as acceptable the submission of counsel for the plaintiff that the plaintiff's claim was made bona fide.

[8] It is clear that all the defendants knew right from the start that the plaintiff was a company which was set up for a purpose of taking over the business of the fifth defendant in the event that the s 176 scheme of arrangement was successful. A company of this nature is not expected to carry a large asset — its principal objective being merely to take over the fifth defendant business.

[9] I am unable to agree with the submission of counsel for the first to fourth defendants as that the plaintiff's claim was not bona fide merely on the ground that the scheme had failed and the highest court in the land had confirmed the High Court's refusal to sanction the scheme. The plaintiff's claim is based on the alleged unlawful termination of the definitive agreement which it had secured with the fourth defendant. The success or failure of its claim would have to be determined within the four corners of that agreement where the relevant clauses would have to be examined to decide whether the termination was lawful. The decision of the court in disapproving the scheme of arrangement is only an element in the equation, may not necessarily be the only one that would determine the plaintiff's claim.

[10] I would allow the appeal with costs.

Appeal allowed with costs.

Reported by Navit Kaur Randhawa